



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[ET Docket No. 10-235; FCC 12-45]

Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, Report and Order.

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In the Report and Order, the Commission takes preliminary steps toward making a portion of the UHF and VHF frequency bands currently used by the broadcast television service available for new uses as required under the recently enacted Spectrum Act, while also preserving the integrity of the television broadcast service.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Shaun Maher, Shaun.Maher@fcc.gov of the Media Bureau, Video Division, (202) 418-2324.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, FCC 12-45, adopted on April 27, 2012, and released on April 27 2012. The full text of the Report and Order is available for inspection and copying during regular business hours in the FCC Reference Center, 445 12th Street, SW., Room CY-A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site,

<http://www.bcpi.com>, or call 1-800-378-3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

Executive Summary:

In the Report and Order, the Commission takes a preliminary step toward making a significant portion of the UHF and VHF frequency bands (U/V Bands) currently used by the broadcast television service available for new uses. This action serves to further address the nation's growing demand for wireless broadband services, promote the ongoing innovation and investment in mobile communications and ensure that the United States keeps pace with the global wireless revolution. At the same time, the approach helps preserve broadcast television as a healthy, viable medium and would be consistent with the general proposal set forth in the National Broadband Plan to repurpose spectrum from the U/V bands for new wireless broadband uses through, in part, voluntary contributions of spectrum to an incentive auction. This action is consistent with the recent enactment by Congress of new incentive auction authority for the Commission (Spectrum Act). Specifically, this item sets out a framework by which two or more television licensees may share a single six MHz channel in connection with an incentive auction.

Paperwork Reduction Act of 1995 Analysis:

The Report and Order contains no new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13 (44 U.S.C. 3501 through 3520).

Synopsis

The Report and Order does not act on the proposals in the Notice of Proposed Rulemaking to establish fixed and mobile allocations in the U/V bands or to improve TV service on VHF channels. The Report and Order states that the Commission will undertake a broader rulemaking to implement the Spectrum Act's provisions relating to an incentive auction for U/V band spectrum, and that it believes it will be more efficient to act on new allocations in the context of that rulemaking. In addition, the record created in response to the Notice of Proposed Rulemaking does not establish a clear way forward to significantly increase the utility of the VHF bands for the operation of television services. The Report and Order states that the Commission will revisit this matter in a future proceeding.

With respect to the channel sharing provisions, the Report and Order makes clear that channel sharing arrangements will be voluntary. Broadcasters will decide whether to enter into a channel sharing arrangement and will be given flexibility with respect to determining some of the key parameters under which they will combine their multiple television stations onto a single six MHz channel.

Despite sharing a single channel and transmission facility, each station will continue to be licensed separately, have its own call sign and will separately be subject to all of the Commission's obligations, rules, and policies. Each station must comply with the technical, operational, and programming obligations (e.g., children's programming, political broadcasting, minimum operating hours, main studio, Emergency Alert System).

Stations utilizing a shared channel will be required to retain at least enough capacity to operate one standard definition (“SD”) programming stream in order to meet the Commission’s requirement to “transmit at least one over-the-air video broadcast signal provided at no direct charge to viewers.” However, stations will have the flexibility within this “minimum capacity” requirement to tailor their agreements. This flexible channel sharing will allow parties to meet their individual programming and economic needs.

Class A television stations may participate in channel sharing in connection with an incentive auction but low power television and TV translators may not.

Any full power television or Class A television permittee, as well as any applicant for an original construction permit may execute a channel sharing agreement. The party relinquishing spectrum, though, must hold a license prior to the commencement of the auction process.

Commercial and noncommercial educational (NCE) stations are permitted to share a single television channel.

The Report and Order defers consideration of ownership issues that may arise as a result of channel sharing arrangements until a future proceeding.

As mandated in the Spectrum Act, the channel sharing rules will neither increase nor decrease the cable and satellite carriage rights currently afforded broadcast licensees. Specifically, regardless of the number of stations sharing a single six MHz channel, each station will be licensed separately and will therefore continue to have at least one—but

only one—“primary” stream of programming entitled to carriage rights under the rules so long as the licensee continues to meet all relevant technical requirements.

The Report and Order leaves for future consideration the subject of channel sharing by stations outside the context of an incentive auction.

Final Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)¹ an Initial Regulatory Flexibility Analysis (“IRFA”) was included in the Notice of Proposed Rulemaking (FNPRM) in this proceeding.² Written public comments were requested on the IRFA. This present Final Regulatory Flexibility Analysis.³

A. Need for, and Objectives of, the Proposed Rules

In the Report and Order, the Commission amends its rules to establish a framework that permits two or more television licensees to share a single six megahertz TV channel. The new channel sharing rules framework will, for the first time, permit two or more television stations to share a single channel. Such sharing will allow stations to relinquish a portion of their spectrum for new uses while continuing to provide television service to viewers.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments received in response to the IRFA.

¹ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. 104-121, Title II, 110 Stat. 847 (1996).

² See FNPRM, 25 FCC Rcd 13833.

³ See 5 U.S.C. 604.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁷

Television Broadcasting. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."⁸ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁹ The Commission has estimated the number of licensed

⁴ 5 U.S.C. 603(b)(3).

⁵ 5 U.S.C. 601(6).

⁶ 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. 601(3).

⁷ Small Business Act, 15 U.S.C. 632 (1996).

⁸ U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting" (partial definition); <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>.

⁹ 13 CFR 121.201, NAICS code 515120 (updated for inflation in 2008).

commercial television stations to be 1,387.¹⁰ In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,387 commercial television stations (or approximately 72 percent) had revenues of \$13 million or less.¹¹ We therefore estimate that the majority of commercial television broadcasters are small entities.

We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹² must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 393.¹³ These stations are non-profit, and

¹⁰ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 11, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf

¹¹ We recognize that BIA’s estimate differs slightly from the FCC total given *supra*.

¹² “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 CFR 21.103(a)(1).

¹³ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 11, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf

therefore considered to be small entities.¹⁴

In addition, there are also 6,739 low power television stations (LPTV), TV Translators and Class A television stations.¹⁵ Given the nature of this service, we will presume that all of these licensees qualify as small entities under the above SBA small business size standard.

Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”¹⁶ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.¹⁷ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for

¹⁴ See generally 5 U.S.C. 601(4), (6).

¹⁵ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2011,” dated January 11, 2012; http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf

¹⁶ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹⁷ 13 CFR 121.201, NAICS code 517110.

the entire year.¹⁸ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹⁹ Thus, the majority of these firms can be considered small.

Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁰ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²¹ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²² Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.²³ Thus, under this second size standard, most cable systems are small.

Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in

¹⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹⁹ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

²⁰ 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²¹ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²² 47 CFR 76.901(c).

the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁴ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁵ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁶ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²⁷ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

D. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements for Small Entities

The Report and Order contains no new or revised information collection requirements subject to the Paperwork Reduction Act of 1995.²⁸

²³ Warren Communications News, *Television & Cable Factbook 2008*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

²⁴ 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1-3.

²⁵ 47 CFR 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

²⁶ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

²⁷ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. *See* 47 CFR 76.909(b).

²⁸ The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁹

The Report and Order adopted general channel sharing rules and policies. Among these, the Commission determined that only licensees would be permitted to participate in channel sharing in conjunction with the reverse auction. The Commission found that the burden on small entities of limiting channel sharing to only licensees is outweighed by the need to clear as many television channels are possible for reallocation and use by commercial wireless entities to enhance broadband wireless offerings.

The Commission permitted Class A television stations to participate in channel sharing but channel sharing by low power television stations and TV translators was not permitted. The Commission determined that the burden on small entities is outweighed by the intent of Congress to limit channel sharing in conjunction with the reverse auction to only full power television and Class A stations as well as the need to complete the successful repacking of television channels and identify channels for reallocation to

²⁹ See 5 U.S.C. 603(c).

broadband wireless use.

The Commission determined that commercial and noncommercial educational television stations could share a single television channel. The Commission did not find that there would be a significant impact on small entities by this decision. The decision would have little impact and any impact would affect all entities equally.

The Commission adopted a requirement that stations involved in channel sharing retain the right to use at least enough spectrum to operate one SD channel. The Commission did not find that there would be a significant impact on small entities by this requirement. Since channel sharing is voluntary, the requirement of retaining sufficient channel capacity to operate at least 1 SD channel would have little impact and any impact would affect all entities equally.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

None.

G. Report to Congress

The Commission will send a copy of the Report and Order, including the FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.³⁰ In addition, the Commission will send a copy the Report and Order, including FRFA, to the

³⁰ See 5 U.S.C. 801(a)(1)(A). The Congressional Review Act is contained in Title II, section 251, of the CWAAA, *see* Pub. L. 104-121, Title II, section 251, 110 Stat. 868.

Chief Counsel for Advocacy of the Small Business Administration. A copy of this Report and Order and FRFA (or summaries thereof) will be published in the Federal Register.³¹

List of Subjects

47 CFR Part 73

Television, television broadcasting.

47 CFR Part 76

Cable television.

FEDERAL COMMUNICATIONS COMMISSION.

Marlene H. Dortch,
Secretary.

³¹ See 5 U.S.C. 604(b).

Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 73 and 76 as follows:

PART 73 – RADIO BROADCAST SERVICES

1. The authority citation continues to read:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

2. Add § 73.3700 to read as follows:

§ 73.3700 Channel sharing.

(a) Channel sharing generally. For purposes of this subsection, “reverse auction” shall mean the reverse auction set forth in section 6403(a) of the See Middle Class Tax Relief and Job Creation Act of 2012. Subject to the provisions of this section, qualified television stations may voluntarily seek Commission approval to share a single six megahertz channel in conjunction with a proposal submitted in the reverse auction. Each station sharing a single channel shall continue to be licensed and operated separately, have its own call sign and be separately subject to all of the Commission’s obligations, rules, and policies.

(b) Basic qualifications. (1) Any full power television station or Class A television station permittee or licensee, as well as any applicant for an original construction permit may execute a channel sharing agreement to be considered in conjunction with the reverse auction.

(2) The party relinquishing spectrum pursuant to a channel sharing agreement must hold a license prior to the commencement of the reverse auction wherein its channel sharing agreement shall be considered.

(3) Channel sharing agreements shall contain a provision requiring that each channel sharing licensee shall retain spectrum usage rights adequate to ensure a sufficient amount of the

shared channel capacity to allow it to provide at least one Standard Definition (SD) program stream at all times.

(4) Channel sharing is permissible between commercial and noncommercial educational television stations.

(5) Channel sharing is permissible between full power television stations, between Class A television stations and between full power and Class A television stations.

(c) Preservation of carriage rights. A broadcast television station that voluntarily relinquishes spectrum usage rights under this section in order to share a television channel and that possessed carriage rights under section 338, 614, or 615 of the Communications Act of 1934 (47 U.S.C. 338; 534; 535) on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

PART 76 – MULTICHANNEL VIDEO AND CABLE SERVICE

3. The authority citation continues to read:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

4. Add 76.56(g) to read as follows:

§ 76.56 Signal carriage obligations.

* * * * *

(g) Channel sharing carriage rights. A broadcast television station that voluntarily relinquishes spectrum usage rights under 73.3700 of this chapter in order to share a television channel and that possessed carriage rights under section 338, 614, or 615 of the Communications Act of 1934 (47

U.S.C. 338; 534; 535) on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

5. Add 76.66(n) to read as follows:

§ 76.66 Satellite broadcast signal carriage.

* * * * *

(n) Channel sharing carriage rights. A broadcast television station that voluntarily relinquishes spectrum usage rights under § 73.3700 of this chapter in order to share a television channel and that possessed carriage rights under section 338, 614, or 615 of the Communications Act of 1934 (47 U.S.C. 338; 534; 535) on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

[FR Doc. 2012-12551 Filed 05/22/2012 at 8:45 am; Publication Date: 05/23/2012]